#462

ARBITRATION
BETWEEN

The Ohio State Highway Patrol

and

The Fraternal Order of Police,
Ohio Labor Council, Inc.

Grv. #15-03-891120-164-04-01

Daniels, Elizabeth A.
Heard May 23 1990

Appearances:

For the Patrol:

Sergeant Richard G. Corbin
Personnel Labor Relations

For the F.O.P.:

Walter Florence, Esq.
General Counsel

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

Statement of the Case:

On September 25, 1989, District Three Commander Captain L.P. Hardesty, charged Trooper Elizabeth A. Daniel of the Ashland, Ohio Post, with the following charges of misconduct:

> It is herewith stated that reasonable and substantial cause exists to establish that Trooper Elizabeth A. Daniel has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:
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> Rule 4501:2-6-02 (B) (3) & (4)
>
> Rule 4501:2-6-02 (I) (2)
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> It is charged that on June 12, 1989, and again on June 13, 1989, while off duty, Trooper Daniel failed to advise her Post that she would not be available for recall to duty. To wit; Trooper Daniel failed to make herself available for a confirmation phone call from the Ashland County Law Director, that the court case she was scheduled to testify in, was still set to go forth on June 13, 1989.
>
> It is also charged that on June 13, 1989, Trooper Daniel failed to perform assigned duties because of an error in judgement or otherwise failed to perform satisfactorily a duty of which such member is capable. To wit; on June 13, 1989, Trooper Daniel failed to appear as a witness at a scheduled D.U.I. jury trial which resulted in the jurors being dismissed and the trial being rescheduled. Said failure to appear brought discredit to the Ohio State Highway Patrol.

In this regard Rule 4501: 2-6-02 (B) (3) and (4), and Rule 4501: 2-6-02 (I) (2), provide in pertinent part as follows:

"4501:2-6-02 Performance of Duty And Conduct

* * * *

(B) Performance of duty

* * * *

(3) Members who are off duty shall keep their Post advised when they are not available for recall to duty.

(4) Members who fail to perform assigned duties because of an error in judgment or otherwise fail to perform satisfactorily a duty of which such member is capable, may be charged with inefficiency.

* * * *

(I) Conduct unbecoming an officer. A member may be charged with conduct unbecoming an officer in the following situations:

* * * *

(2) For conduct that brings discredit to the Ohio State Highway Patrol and any of its members.

Found guilty of the charged conduct following a pre-disciplinary hearing, a five day disciplinary suspension was imposed upon Trooper Daniel. In due course Trooper Daniel grieved this suspension, seeking by way of remedy that her "record be expunged of this violation and return of five (5) days compensation in pay."

The parties have stipulated that the issue is:

"was the grievant disciplined for just cause in accordance with Article 19, Section 19.01 and Section 19.05 of the collective bargaining agreement between the parties? If not, what shall the remedy be?"

In this regard the parties' Contract provides:

"Article 19 - Disciplinary Procedure

Section 19.01 Standard.

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

* * * *

Section 19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);

2. Written Reprimand;

3. Suspension;

4. Demotion or Removal.

However, more severe discipline (or a combination of disciplinary actions) may be improved at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant."

Many of the operative facts in the case are set forth in City of Ashland Assistant Director of Law W. David Montague's letter of complaint to Lt. Molnar, Commander at the Ashland post, wherein Montague wrote as follows:

> I am writing to confirm our telephone conversation of June 13, 1989. As I indicated at that time, on June 12, 1989, at approximately 5:00 p.m., I had occasion to talk with Trooper Daniel with regard to the above-styled case. I had called her on a peripheral issue and in the course of conversation, learned from her, that she was under the impression that the above-styled case, for which she is a necessary witness, was not to go forward on June 13. I indicated to her that I thought that she was in error; whereupon, she indicated

that if she was needed, I would need to call her, because otherwise, she would not be at the trial. Immediately after hanging up the phone from talking with Trooper Daniel, I called the Court and learned that Trooper Daniel was, in fact, needed as a witness in the above-styled case. Thereafter, I called Mr. Wolfe, who was going to try the trial on my behalf. I then called Trooper Daniel back. There was a time lapse of approximately five (5) minutes between my first call to Trooper Daniel and my second. Upon the second call to Trooper Daniel, there was no answer. I tried repeatedly throughout the evening of June 12, 1989, to contact Trooper Daniel and tell her that she was needed. I left a message with her daughter that she would be needed for trial; I went out to her house to see if she was at home; I called her at 6:45 a.m. on June 13, 1989, and there was no answer; and I understand that Sgt. Dreisbach checked her house later that same morning, not to find her home.

While I certainly have no complaint that Trooper Daniel wished for me to call her in the event that she was mistaken about the status of the McFadden trial, I am concerned that after she was apprised that there might be a problem, she did nothing to let me know how I could get hold of her. In the course of our conversation on the evening of June 12, she made no reference to the fact that she was going to be leaving shortly thereafter, and would not return until after the trial was scheduled to begin. I feel that it was incumbent upon her, after I informed her that she possibly misunderstood the need for her presence at the trial, that she should have told me how I could get ahold of her. I certainly thought that if I called back within the five (5) minute time period that I did, that Trooper Daniel would still be there, able to answer the phone.

In the course of our conversation on the evening of June 12, Trooper Daniel also represented that she had been informed by someone at the Patrol Post that she would not be needed for the McFadden trial. In the course of my attempts to try and contact Trooper Daniel, I also note that this trial has been crossed off your daily schedule sheet for June 13, 1989. I would like to know from Trooper Daniel who it was that told her that she would not be needed, and who crossed this off your trial schedule. My review of this case with each member of the Law Director's office indicates that no one from this office called the Post to tell them that this trial was cancelled.

If you need any further information from me, please do not hesitate to get in touch. Thank you for your attention to this matter.

Mr. Montague's testimony at the arbitration hearing essentially conformed to this account. Also testifying on behalf of the Patrol was Sergeant Steven Dungan, who conducted the Patrol's investigation concerning Montague's letter of complaint. Dungan indicated that there were various other avenues of notice such as the radio log in addition to the 45-9 form relied on by the Grievant, which would indicate the status of pending court cases, and that none of these sources reflected that the McFadden matter was not going forward on June 13, 1989, as concededly did the Form 45-9. On cross-examination Sergeant Dungan indicated that he personally does not let the Patrol know of his whereabouts when he's off duty. Sgt. Dungan also indicated that while he was aware of a Trooper being disciplined some 15 years ago for failing to let the Post know of his whereabouts while off duty, he was not aware of any such discipline since the inception of the parties collective bargaining agreements and its "just cause" standard for discipline.

The Grievant testified that she checked the Form 45-9 every day and that it indicated that the McFadden trial on June 13th had been crossed out indicating it was cancelled. She then contracted the Ashland Ohio Police Department arresting officer, patrol officer Hoover, and inquired as to why the McFadden trial had been called off. Hoover informed her that it appeared that

the prosecution was not going to rely on the Breathalyzer test that she administered to McFadden.

With respect to her telephone conversation with Assistant Law Director Montague on the evening of June, 1989, the Grievant testified that Montague initiated the conversation by stating that her daughter's trial (the "peripheral issue" referred to by Montague in his letter of complaint" would not be going forward the following day. According to the Grievant, in that conversation Montague stated that it looked like her McFadden case was going forward. It was the Grievant's testimony that she told Montague that she was off of the McFadden case, and that he indicated he wasn't aware of that and that he'd check on it. The Grievant asserts she told him "to get back because I was not going to be there unless I heard further." Following her conversation with Montague the Grievant claims she did some housecleaning and ran a vacuum and that if he did call her back as he claims, she didn't hear the phone. Shortly thereafter she left for the evening and did not return home until about noontime. The Judge in the McFadden matter granted a continuance.

The Grievant conceded that it was her responsibility to verify whether or not she was needed in Court. In this regard she further conceded that she did not call the Court to verify whether or not she was to be in Court on June 13, 1989. She also concedes that she did not call the Post and report where she

could be reached after she left her home on the evening on June 13, 1989.

Trooper Charles Bisesi, an eighteen-year veteran of the Ashland Post testified that the call-in rule was never enforced at the post and was never followed by anyone. In support of this contention the F.O.P. presented numerous logs, all failing to reflect anyone calling in and leaving a message as to where they could be reached. Trooper Bisesi further credibly testified that both before and since the initial collective bargaining agreement he didn't call where he'd be and he wasn't disciplined for it.

Staff Representative Edward Baker of the Ohio Labor Council testified that following the incident under scrutiny here the Patrol had occasion to seek to enforce the call in rule, but that when the F.O.P., O.L.C. took the position that enforcement would trigger stand-by pay entitlement, the Patrol backed off.

Finally it is noted that the Grievant has amassed an unenviable disciplinary record as follows:

DATE	TYPE OF DISCIPLINE	OFFENSE
11/02/82	2-day Suspension	Accidental Discharge of shotgun
07/19/83	Formal Reprimand	Failed to maintain communications with post
09/067/83	Counseling	Failed to adequately perform routine duties
09/29/83	Formal Reprimand	False statement to Supervisor
03/05/84	Formal Reprimand	Patrol Car Accident

DATE	TYPE OF DISCIPLINE	OFFENSE
05/10/84	Formal Counseling	Conducted personal business in uniform
06/01/84	Counseling	Damaged equipment Camera
02/25/85	Formal Reprimand	Lost Violator's Operators' License
04/11/85	Formal Counseling	Failed to take necessary action when investigating accident
01/13/86	Formal Reprimand	Failed to provide report to court
04/08/86	Formal Reprimand	Cited violator into wrong court
04/23/86	Formal Reprimand	Patrol Car accident
04/23/86	Formal Reprimand	Cited Violator into wrong court
07/10/86	Written Reprimand	Failed to appear for court case
07/23/86	Verbal Reprimand	Disobeyed order, did not leave Patrol Car on Post
05/19/87	3-Day Suspension	Failed to provide statement with D.W.I. Arrest - resulting in dismissal of case
05/19/87	Written Reprimand	Patrol Car accident
06/27/87	4-Day Suspension	Filed affidavit in wrong court
11/11/87	5-Day Suspension	Cited wrong O.R.C. provision

These last two 1987 suspensions were challenged through the grievance/arbitration procedure and came before the undersigned

as Arbitrator. In my Opinion and Award dated December 2, 1988 the mode of the discipline, i.e. suspension for court related inefficiencies, was sustained; the length of the suspensions was modified, for reasons not germane here.

The F.O.P.' Position:

The F.O.P.'s position is grounded in its opening and closing statements and in the Grievant's requested remedy in her grievance. Thus the F.O.P. contends that while it "does not dispute the basic facts, it does dispute the Patrol's characterization of same." It is the F.O.P.'s contention that the Grievant acted reasonably in all the circumstances. According to the F.O.P. the Arbitrator is asked to second-guess the decisions conduct of the Grievant; some would do less - others more; but her response is reasonable in view of her assessments. Thus the F.O.P. points out that the 45-9 reflected that the Grievant's appearance in Court on June 13, 1989, was no longer required and it asserts that the Grievant was entitled to rely on it. The F.O.P. additionally points out that the Grievant took the additional step of contacting arresting officer Hoover in order to ascertain why her court appearance was no longer necessary, and that she was informed by Hoover that the prosecutor was going to rely on the defendant's behavior and not the test results which the Grievant conducted, to prove the defendant's guilt. These circumstances lead the Grievant to reasonably conclude that she'd not be called as a witness in the McFadden matter. When she found out from Assistant Law Director

Montague that perhaps her testimony would be required in the McFadden matter she reasonably sought confirmation of such, asserts the F.O.P., and it's unfair to classify this request for confirmation from Montague as an "ultimatum." The reasonableness of the Grievant's request is enhanced, asserts the F.O.P., by the fact that Director Montague was not the prosecuting attorney in the McFadden case.

Additionally, asserts the F.O.P., the Grievant is charged with two violations: failure to advise the Post that she would not be available for recall to duty, and failure to perform assigned duties. But, asserts the F.O.P., the rule prescribing failing to advise the Post etc. is not regularly followed and enforced. Accordingly, argues the F.O.P., the Grievant's disciplinary pay off must be reduced. Enforcing this rule could prove costly to the City contends the F.O.P. The penalty imposed must in any event therefore be modified.

So it is that the F.O.P. urges that the grievance be sustained.

The Patrol's Position:

The Patrol's position is grounded in its opening and closing statements and in its Level III findings. It is the Patrol's position that the Grievant did not act reasonably in all the circumstances. Thus the Patrol asserts that "the Grievant's failure to call the Court . . . . when she was not contacted by . . . . prosecutor [Montague] is an inexcusable example of the grievant's poor judgement. It is not the prosecutor's obligation

to ensure the grievant's appearance when she has been duly notified to appear. This was not a simple case of miscommunication or forgetfulness. The Grievant was informed by a court official she would be needed in court to testify the night before a scheduled case [and] she simply failed to appear. The Grievant has an obligation to appear in Court when her testimony is necessary for the prosecution of a criminal case arising from her official duties. . . . . [T]he Grievant knew to expect a return call from prosecutor Montague. He made that call not more than five minutes after he told her he would verify the need for her appearance. The Grievant apparently believes her ultimatum to the prosecutor that she would not appear unless he recontacted her relieves her of any responsibility." It is the Patrol's position that the Grievant was obligated to verify whether her appearance in Court was required. She is not in a position legally or by Highway Patrol policy to excuse herself due to being unavailable to answer an expected return phone call. . . . . If she was unavailable for a return call she was required by rule to notify the Post, she did not notify the Patrol Post." In this regard the Patrol asserts that there is no evidence of the Patrol's unwillingness to enforce this rule on giving notice when violations of same are brought to its attention.

It is the patrol's contention that "the Grievant's failure to appear in court resulted in inconvenience to the judge, the prosecutor, court administrative personnel, other witnesses, the defense attorney, and the defendant. Clearly, her inefficiency

brought discredit to the Ohio Highway Patrol as evidenced by the letter of complaint authored by . . . . Montague and the obvious inconvenience to all other persons involved in the trial. . . . . [T]he Grievant's personal failure to follow through on her individual obligation created considerable and unnecessary disruption in the criminal justice process.

The Grievant has established a pattern of court related inefficiency dating back to 1986. She has twice before been suspended for court related inefficiency. . . . . [T]he Grievant violated the applicable work rules by failing to appear for a scheduled court case. The imposition of a five-day suspension was both progressive and commensurate discipline for the proven offense. Previous, less severe disciplinary action has not changed the grievant's . . . . inefficient court related behavior."

So it is that the Patrol urges that the grievance be denied.

Discussion and Opinion:

Once again the Grievant is being disciplined for Court related inefficiency i.e. failure to report as a witness as required. As the Patrol asserts, a pattern of such inefficiency is emerging. It seems to me beyond question but that following her suspensions for such in June and November of 1987, the Grievant had to have known, and is imputed to have known, that she was on "thin ice" when it came to still further Court related problems. This being so it is found that the Grievant had to be especially careful with respect to performing her job efficiently

when it came to work related matters before the Courts. It seems to me abundantly clear that the Grievant simply fell considerably short of the standard of care she brought upon herself by her repeated court related inefficiencies and inability and/or unwillingness to correct them. Given the history of the Grievant's overall disciplinary record, and in particular her court related inefficiencies record, it can't be seriously questioned but that the Grievant, in the face of some uncertainty as to her need to be in Court as a witness on June 13, 1990 (said uncertainty having been created by the conflict between Montague's message and the Form 45-9), was under an obligation to clarify the uncertainty and actively ascertain for herself whether she in fact was to testify. This she did not do. Since three and four day suspensions for Court related inefficiencies had recently preceded this the latest of the Grievant's misconduct of the same nature, a five day suspension was clearly not too severe.

As was observed by the undersigned in his prior decision involving the Grievant, referred to hereinabove: ". . . . one's disciplinary record and recidivism is a most relevant circumstance to be considered in determining whether to administer formal discipline in the first place, and if so, in what measure."

But what of the F.O.P.'s contentions to the effect that the Grievant was charged and found guilty of two offenses, the court related inefficiency discussed above and a breach of the failure-

to-call-in rule, the latter being improperly enforced against the Grievant, having not been previously enforced at the Post. In this regard I find that the record supports the F.O.P.'s contention that the call-in rule has not been previously enforced at the Post, and hence it can not properly be enforced ex post facto against the Grievant. Following a history of non-enforcement it may arguably be enforced only after a clear notice and announcement to that effect; it may not suddenly be enforced by way of specific discipline of a particular employee and in order to make an example. What impact then does this have on the measure of discipline imposed here? In my judgment none. Thus as the Elkouris have cogently observed in their learned arbitration treatise How Arbitration Works, 4th. Edition, 1985, at pages 676 and 677 (and citing Arbitrator Whitley McCoy's decision in Esso Standard Oil Co., 19 LA 495, 497-498 (19952) in support thereof): ". . . . there is a line of cases in which the Company's evidence was held inadequate to establish the offense for which the employee had been disciplined but was held to be adequate to establish a related lesser offense for which an appropriate penalty (either as assessed by the employer or as reduced by the arbitrator) was in order."

As Arbitrator McCoy observed: "The penalty was imposed as a result of the facts . . . . Giving a name to those facts is not important. There was a time when the criminal law was so technical that on a given set of facts a conviction of larceny would be set aside on the ground that those facts constituted

embezzlement and vice versa, Arbitration should not be tied up with such technicalities. . . . . [The] facts constitute an offense, and I do not think the [Arbitration] Board is bound to set a penalty aside merely because the facts fail to prove conclusively [the precise offense charged]."

This type of analysis [1] is especially appropriate here where the failure-to-call-in violation is in effect subsumed within the court inefficiency charge. Thus had the Grievant called in her whereabouts she could have been contacted and advised that indeed her Court appearance was necessary, and the court inefficiency would presumably have been avoided.

In light of all the foregoing the grievance must be denied, with the caveat that references to the Grievant's violation of the call-rule be purged from her record.

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[1] Compare the analysis of Arbitrator Gradwohl in Iowa Power & Light Co., 76 LA 482, 487 (1981) concerning multiple grounds for discipline. There, unlike here, it was patently clear that each stated ground was given meaningful weight vis a vis the quantum of penalty imposed. In the instant case that analysis does not stand up, given the Patrol's considerable restraint in imposing but a five-day suspension for the proven court inefficiency in light of the Grievant's disturbing recidivism in that regard.

Award:

For the reasons more fully set forth above the grievance is denied, with the caveat that references to the Grievant's having violated the call-in rule shall be purged from her record. A five-day disciplinary suspension for court related inefficiencies was proper.

Dated: July 12, 1990

Frank A. Keenan
Arbitrator